83-1277

No.

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In the

Supreme Court of the United States

OCTOBER TERM, 1983

SANDRA STEGE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ROBERT H. STEGE,

Petitioner,

vs.

UNITED STATES OF AMERICA and MUHAMMED A. ANSARI,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE CONIGLIO
FRANK E. GLOWACKI
DONALD E. ARNELL
2428 Vermont Street
Blue Island, Illinois 60406
(312) 385-5500

The Scheffer Press, Inc.—(312) 263-6850

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Administratrix of the deceased serviceman's estate may properly maintain a cause of action against the United States of America under the Federal Tort Claims Act, 28 U.S.C., Section 1346(b), 2671, et seq., for alleged medical malpractice by a military surgeon who was subsequently tried by a court-martial for acts alleged in the Plaintiff's Complaint.

II.

Whether a dependent of a serviceman may properly maintain a cause of action against the United States of America under the Federal Tort Claims Act, 28 U.S.C., Section 1346(b), 2671, et seq., for negligent infliction of emotional distress arising out of negligent acts by a military surgeon in the surgical and post-operative treatment of a serviceman in a military hospital.

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No.

SANDRA STEGE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ROBERT H. STEGE,

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vs.

UNITED STATES OF AMERICA and MUHAMMED A. ANSARI,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

George Coniglio, Frank E. Glowacki and Donald E. Arnell, on behalf of Sandra Stege, Individually and as Administratrix of the Estate of Robert H. Stege, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals was unpublished pursuant to Circuit Rule 35 and is attached hereto as Appendix A, p. 1a. The opinion of the district court is not reported and is attached hereto as Appendix B, p. 4a.

JURISDICTION

The judgment of the court of appeals (App. A infra p. 1a), was entered on October 21, 1983. The jurisdiction of this court is invoked under 28 U.S.C. 1346(b), 2671 et seq.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions quoted in the jurisdictional statement are the statutory provisions involved in this particular matter.

STATEMENT OF THE CASE

On March 21, 1979, Sergeant Robert H. Stege, a serviceman on active duty in the United States Army, was admitted to the Naval Regional Medical Center at Great Lakes, Illinois for elective surgery to correct a small varicocele condition causing primary infertility. The operative procedure, called a varicocelectomy, was done on March 22, 1979 and consists of ligating the spermatic vein which is considered a rather simple operation. During surgery, Doctor Muhammed Ansari severed the left external iliac vein and left femoral vein which are major veins returning blood from the left leg. Corrective surgery was attempted on March 23, 1979 after a 27-hour delay. Sergeant Stege was transferred

on April 3, 1979 to Veterans Administration Medical Center at North Chicago, Illinois where his condition deteriorated until ultimately he died on May 1, 1979 in septic shock.

Doctor Ansari was court-martialed by naval authorities and found guilty of involuntary manslaughter. His conviction was reversed by a military reviewing court which reduced the findings to dereliction of duty, letting stand the official reprimand and a $2,000.00 fine.

This is the first time in military history that a surgeon was court-martialed for conduct relating to medical and surgical treatment.

REASONS FOR GRANTING PETITION

Can a rule of law which prohibits redress for all wrongs committed and in all circumstances be reconciled by a nation which is founded upon principles of fairness and justice?

Can a rule of law persist when it offends all reasonable persons of ordinary sensibilities?

The answer would seem to be an emphatic NO! Yet, despite the disfavor with which the "Feres" doctrine is increasingly viewed by Federal Courts in the recent past, "Feres" clearly lives—although its theoretical basis is subject to serious doubt! See *Jaffee* v. *United States*, 592 F. 2d 712; *Labash* v. *United States Department of the Army*, 668 F. 2d @ 1156; *Hunt* v. *United States*, 636 F. 2d 580, 589; *Thomason* v. *Sanchez*, 539 F. 2d 955, 960 (3rd Cir.); *Veillette* v. *United States*, 615 F. 2d 505, 506 (9th Cir.); and most recently the refusal by Chief District Court Judge Jack B. Weinstein to except the United States in a case involving the Vietnam War veterans against the government and makers of Agent Orange.

The case at bar involves conduct by a military medical surgeon which was so outrageous that his superiors regarded the acts as criminally actionable.

A discussion of the "Feres" doctrine in the circumstances of the instant case demands that our attention be directed to the fact that all cases decided under "Feres" failed to recognize a distinction which is uniquely found in medical malpractice cases. That distinction is whether the decision to undertake a course of ac-

tion by a military physician or surgeon is a policy decision or a military decision which will in any manner affect the effective operation of government in achieving its purpose. The decision involved in the treatment of patients is not a discretionary one. To perform his duties, a military physician or surgeon, while engaged in the treatment of patients, is not involved in making policy decisions nor in planning or making judgments which impair military discipline or subject the military command to public criticism or scrutiny by civilian courts of justice. Government immunity from liability in claims brought by servicemen on active duty as enunciated by "Feres" should not be mechanically applied. Immunity should not be conferred in all circumstances and for all purposes.

In *Doe* v. *McMillan*, 412 U. S. 306, 93 Supreme Court 2018, the Supreme Court considered a case dealing with whether Defendant's acts were discretionary arising from alleged invasion of privacy by the Superintendent of Documents and the Public Printer in publishing certain derogatory remarks for use in Congress and elsewhere.

In deciding the case, the Court examined and defined what act or acts constitute those which are discretionary and stated that it is a test of two parts. One is a balancing test of policies underlying the immunity doctrine in the context of each fact situation, i.e., harm to the individual balanced with the threat to effective government. The other is whether the act was discretionary. For guidance as to what constitutes discretionary versus ministerial functions, one should look to the *Federal Tort Claims Act*, 28 U. S. C., Section 1346(b), 2671-80, and specifically at 28 U. S. C., Section 2680(a) which excepts claims based on discretionary acts or omissions. General-

ly, a duty is discretionary if it involves judgment, planning or policy decisions. It is not discretionary if it involves enforcement or administration of a mandatory duty at the operational level even if expert evaluation is required. See *Nelms* v. *Laird*, (4th Cir.) 442 F. 2d 1163, reversed on other grounds, 406 U. S. 797, 92 S. Ct. 1899; *Hendry v. United States*, (2nd Cir.) 418 F. 2d 774.

Although it is recognized that all decisions involve judgment and discretion, a strictly medical decision does not involve governmental discretion. This distinction was recognized in *Spence v. General Hospital*, 138 U. S. App. D. C. 48, 425 F. 2d 479, 489. The Court stated in that case:

> "The point is that medical, not governmental, judgment and discretion are involved. The common law of malpractice, as normally applied to private doctors and hospitals, already grants the leeway properly left for expert judgment in the relatively stringent requirements it imposes upon plaintiffs in medical negligence suits. No further leeway is required for the publicly employed doctor or the public hospital than for their private counterparts."

The courts have uniformly held that the discretionary function exception does not except the government from liability for negligent medical care. See *Griggs* v. *U.S.*, (10th Cir.) 178 F. 2d 1.

As to the "Balancing test" between the threat to effective government against the harm to the individual, courts have approached the problem by examining whether claims against medical personnel would discourage the fearless, vigorous and effective administration of policies of government. It has been uniformly held that medical personnel would not be discouraged by the threat of lia-

bility for negligence inside the government as that same threat outside the government has not been shown to deter the "fearless" exercise of medical discretion.

Holding government medical personnel to the same standards of care which they would face outside the government in no way burdens their public responsibility or deters entry into government service of qualified personnel or deters the vigorous exercise of public responsibility once having entered the service. See *Henderson* v. *Bluemink*, 167 U. S. App. D. C. 161, 511 F. 2d 399; *Jackson* v. *Kelly*, (10th Cir.), 557 F. 2d @ 738, 739.

In *Doe* v. *McMillan*, supra, the Supreme Court concluded that harm to the individual's good name and reputation was sufficiently grave to preclude immunity for the public official involved. The court in *Jackson* v. *Kelly*, at page 739, stated:

> "To us, the damage of suffering permanent bodily injury, disfigurement and loss of future earnings is of at least equal gravity as damage to one's reputation. Medical malpractice may result in one being made a cripple for life or even result in death. In some, the damage to individual citizens for negligent medical care is substantial."

How these considerations would constitute or deter from effective government was also considered by the "Jackson" court where, at page 739, it stated:

> ". . . Obviously, some draining of government resources occurs whenever government officials are called to defend their actions in court. In this case, however, the burden to effective government does not outweigh the dangers to individual citizens of being severely or permanently injured or maimed by negligent military physicians. Effective government

would not suffer excessively if monetary compensation were permitted because the alleged wrongful conduct does not involve *politically sensitive judgments or discretionary governmental acts.* Granting damages to plaintiffs would not tend to constrict government functioning in any area where prompt governmental actions and snap governmental judgments are essential." (emphasis added)

Sandra Stege concedes that the foregoing argument and its supporting cases do not squarely address itself to the factual situation which the instant case presents. She does, however, wish to point out that there are distinctions which can be made to show that, even in the situation involving a serviceman who makes a medical claim against a military hospital and doctor, there is some basis upon which the court could recognize that allowing a claim against the government by a serviceman would not affect or frustrate the governmental function or objectives.

Feres Doctrine

The Supreme Court in *Stencel Aero Engineering* v. *United States,* 431 U. S. 666; *United States* v. *Brown,* 348 U. S. 110; and *United States* v. *Nuniz,* 374 U. S. 150, cases which followed *Feres* v. *United States,* 340 U. S. 135, advanced two consequences which would follow if suits for service injuries were to be allowed: first, the effect such suits would have on the willingness of military personnel to follow directions of their superiors, and, secondly, the effect scrutiny by courts of justice would have on military discipline should such inquiries pass upon the propriety of military decisions, security and the common defense of the country, i. e., "second-guessing military orders requiring military personnel to testify

in court as to each other's decisions and actions." See *Stencel Aero Engineering* v. *United States,* 431 U. S. @ 670, 673.

Clearly, since medical decisions are not regarded as effecting governmental functions or policies, how and by what reaching can there be found support for the heretofore announced rationale that claims by servicemen against military hospitals and personnel would undermine discipline and deter the governmental or military purpose?

It is conceded that under combat conditions, field hospitals and their medical personnel may be required to act under unique conditions which are not faced by their private counterparts. However, an exception to such claims can be maintained or, alternatively, if such claims would also be allowed, the conduct of military medical personnel would be tested by the standard of care which one might expect in like circumstances and under like conditions.

When military orders are discussed, it is fundamentally accepted that a conscious awareness exists between the one who gives the order and the one who takes it. It strains the imagination as to how a patient under anesthesia accepts an order. Clearly, the physician is not giving an order nor is he likely to be inhibited in the exercise of his duties by the prospect of adversarial civilian scrutiny by the courts.

"Feres" additionally set out two other factors, namely: 1. The Veterans Benefits Act which establishes a substitute for tort liability by providing a "no fault" compensation system; and 2. the distinctly federal relation-

ship involved between the member of the armed service and the United States Government.

As to the adequacy of compensation, the court in "Feres" reasoned in 1950 that it was unnecessary to allow recovery to military personnel and their dependents as the compensation available at that time was not "negligible or niggardly". The court compared what the plaintiff in the Illinois action joined with "Feres" would receive under the recovery allowable under the then existing Wrongful Death Act and the death benefit under the Workmen's Compensation statute. The comparison in 1950 was perhaps valid. It no longer prevails! In Illinois, there is no limit on damages recoverable for wrongful death and the death benefit under Workmen's Compensation is $250,000.00.

Moreover, the benefits paid to the servicemen and their survivors are or could offset any recovery made by the serviceman or his survivors under any tort action. By so allowing, there would be no "dual system of compensation" under the Veterans Benefits Act and the Federal Tort Claims Act.

As to the "distinct federal relationship" factor, it is difficult to find any such relationship between private individuals. But this factor contemplates the "effects" on military orders, discipline and the requirement that members of the Armed Services would be required to testify against each other as argued above.

The "Stencel" court also stated that governmental liability should not depend on the fortuitous event of where the soldier happens to be stationed at the time of the injury as the state law of that location would control. The consequences of such actions, considering this factor,

is to have military personnel who are subject to transfers and movements from place to place, travelling to the situs of the action at great cost and inconvenience, as well as the inherent problems in reaching the personnel needed to testify. This is true in all litigation where litigants are members of a mobile society. Consider an aircraft case. This factor, like all other considerations, should be balanced against the *harsh* results which follow in not allowing the claims.

The erosion of the "distinctly Federal character" factor and perhaps a precursor of an erosion of the so-called "Feres" doctrine may be seen in the recent decision by the Supreme Court in *Lockheed Aircraft Corporation* v. *United States,* decided February 23, 1983. Citation No. 81-1181, CCH Supreme Court. Bull. P. In the "Lockheed" case, the Court allowed a third party, Lockheed Aircraft Corporation, to seek indemnity from the Government for its tort liability under the Federal Tort Claims Act.

Lockheed settled a claim brought by the Administrator of the decedent, Bottorff, a Federal employee, for wrongful death and for personal injuries before death arising out of an aircraft accident operated by the United States Air Force which crashed due to the negligence of the Government and which was not disputed by them. While the action centered on the application of Section 8116(c) of the Federal Employees Compensation Act, the decision is a clear departure from the position the court took in *Stencel Aero Engineering* v. *United States,* a case where a manufacturer also sought indemnity against the United States by a third-party action. "Stencel" involved a military pilot who received fatal injuries because of an alleged defective ejection device. The court

reasoned that since the decedent had no action because of Feres, the manufacturer had no action against the Government.

The dissent written by Justice Rehnquist in the "Lockheed" case, and joined by Chief Justice Berger, viewed the majority decision as greatly expanding the liability to which the Government may be subjected as previously rejected in "Stencel." The Stencel case applied "Feres" as a limitation of liability of the United States despite any active-passive negligent theories. Both the "Lockheed" case and the "Stencel" case involve statutory payments. In the "Lockheed" case, Bottorff, received benefits under the Federal Employee Liability Act, and the pilot in "Stencel" under the Veterans Benefits Act.

"Feres" was decided 33 years ago, five years after the end of World War II and approximately six months after the beginning of hostilities in Korea. The draft was in full swing. Today, the Armed Services are manned by an all-volunteer force which is recruited by the various branches of the Armed Services extolling the virtues of military life, *including an adequate medical care plan* for servicemen and their dependents.

To deny redress to a serviceman on active duty under circumstances such as are faced in the instant case is to relegate the active-duty serviceman and his dependents to "second-class citizenship."

If the Court establishes a rule—it can be modified, reversed or totally altered by the Court if justice demands. The Supreme Court in "Feres" stated at Page 139:

> "There are few guiding materials for our task of statutory construction. No committee reports or

> floor debates disclose what effect the statute was designed to have on the problem before us, or that it ever was in mind. Under the circumstances, no conclusions can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy."

If Congress does not act to remedy a fundamental injustice in the law, it falls upon the Court to act! Is it conceivable that Congress would allow claims for property damage suffered by servicemen on active duty, yet disclaim in the same legislation any claim by those servicemen for personal injury and death—See *The Military Claims Act*, 10 U. S. C., Section 2733, 31 U. S. C., Section 240-241. Is damage to life and limb less grave than to property?

Consider the history of Comparative Negligence in the State of Illinois. In 1968, the Supreme Court of Illinois decided *Maki* v. *Frelk*, 40 Ill. 2d 193, and held that if contributory negligence was to be abolished as a complete bar to recovery, such a change was a legislative function. The legislature failed to act, so the Court did in *Alvis* v. *Ribar*, 85 Ill. 2d 1. So it took 45 volumes of reports for the Court to adopt comparative negligence as the law of Illinois, although the legislature did consider and reject comparative negligence legislation.

In the case at bar, Sergeant Stege was, in effect, detached to the military hospital which would place him under the command of the hospital authorities—but not for all purposes dealing with his military service. For example, the hospital authorities could not court-martial Sergeant Stege for violation of orders but would have been required to report the violation to his commanding officer of his permanent duty station who would

then undertake appropriate disciplinary action. Further, what conscious or informed judgment was involved on Sergeant Stege's part in accepting or rejecting the orders issued by Doctor Ansari?—especially after the general anesthesia was administered. Then, what could Sergeant Stege do after the initial act of negligence set in motion physical factors which left him at the mercy of those in charge, whose negligent conduct continued by acts or omissions for several days until his death?

Can a doctrine extend to conduct which is found to be unlawful?

Can the courts continually ignore such conduct without recognizing the rights of the victims?

It is axiomatic that the law is developed and refined by the courts sharpening the parameters of duties, rights and damages. When the court assesses damages after finding that there was a breach of the duty, the ultimate purpose is to pronounce that by that act the standard of care which persons, institutions or governments are required to follow was not met. The law is remedial in that regard—and it is undergoing a continual process of growth, especially in the medical malpractice field in the private sector of society. However, the development of military care is lagging behind. In fact, it is the subject of an inquiry at this time by the Armed Services Sub-Committee which is investigating the quality of medical care now offered by military medical installations. No end of pronouncements or proclamations by Congress or others will cause the quality of care to improve. Only scrutiny by courts of justice will sharpen the skills required to provide the care mandated by Congress and achieve the purposes announced.

Claim of Sandra Stege

It was not until recent years that the law recognized infliction of mental distress, *standing alone*, as the basis of a cause of action. In 1961, the Supreme Court of Illinois in the case of *Knierim* v. *Izzo*, 22 Ill. 2d 73, 174 N. E. 2d 157, for the first time recognized an action based upon infliction of emotional distress. It concluded that peace of mind is an interest of sufficient importance to receive protection against invasion. It held in the "Knierim" case that where the defendant caused the plaintiff emotional distress and nervous exhaustion by his threats to murder plaintiff's husband and the fulfillment of the threat, such conduct stated a cause of action *standing by itself*. Again, in 1976, the Illinois Supreme Court addressed itself to the issue in the case of *Public Finance* v. *Davis*, 66 Ill. 2d 85, 360 N. E. 2d 765. The Court adopted the position enunciated in the Restatement of Torts (2d) which set forth the elements of the tort:

> First, the conduct must be extreme and outrageous. Second, the infliction of emotional distress must be severe. Third, reckless conduct would support a cause of action under the rules stated if the conduct was certain or substantially certain to result in severe emotional distress. See Comment i, Restatement of Torts, Section 46 (1965). Liability would extend to situations in which there is a high degree of probability that severe emotional distress would follow and the actor goes ahead in conscious disregard of that probability. *Prosser, Law of Torts* 60, 4th Edition (1971). Fourth, as stated in Comment e of the Restatement of Torts, the extreme and outrageous character of the conduct may arise from an abuse of the position or relationship with another which gives the actor *actual* and ***apparent***

authority over the other or power to affect his interests. (emphasis added)

In 1983, the Illinois Supreme Court in the case of *Rickey* v. *Chicago Transit Authority, Docket* No. 55962, abrogated the impact rule in negligent infliction of emotional distress cases. The Illinois Court followed the vast majority of the jurisdictions in the United States in rejecting the impact rule. In "Rickey", the plaintiff was present with his parents when he observed a serious accident involving his brother, Richard, whose clothes became entangled in an escalator. Richard was choked with the result that he was deprived of oxygen, causing a comatose state in which he remains. The plaintiff was held to have a cause of action for the negligent infliction of emotional distress.

In rejecting the impact rule, the Court discussed the three-part rationale underlying the rule: first, the emotional or mental injuries are not readily foreseeable as natural and proximate consequences of the defendant's negligence; second, without the rule a flood of litigation would follow; and third, the rule prevented fraudulent or fictitious claims. As to the flood of litigation rationale, the Court pointed to other jurisdictions where the rule had been overturned and pointed out that no flood of cases followed. As to the question of foreseeability and fictitious claims, the Court pointed out that adequate safeguards existed in defining foreseeability: first, the plaintiff must be near the scene; second, the injury must result from a direct emotional impact on his senses and must be contemporaneous with his observation of the accident; and third, the plaintiff and the victim must be closely related.

In the instant case, Sandra Stege was given false information concerning her husband's condition following the surgery. She was advised that all went well. She was then advised of complications but still not informed as to the actual situation. When she observed her husband, he was in restraints in obvious pain and discomfort and his condition was critical. Sergeant Stege was not aware of her presence nor of his circumstances. His physical appearance was grotesque. These observations came as a shock to her because of the misinformation and representations to her by Doctor Ansari. It was not until much later in the management of Sergeant Stege's case by consultants that his grave condition was disclosed to her. This conduct constitutes the basis of a cause of action which is independent from any cause of action which Sergeant Stege may have possessed or which may be brought by his estate against the same defendants. Her claim is recognizable in law because it is a distinct and separate claim from the serviceman-husband's.

Under state law, a claim for intentional or negligent infliction of emotional distress is recognized as a valid cause of action which is separate and distinct from any cause of action which may exist in the person who received the trauma.

Sandra Stege's case meets all of the elements of the tort—infliction of emotional distress as discussed above.

Her cause of action must not be dismissed simply because of the use of the term "intentional" or by the suggestion that her cause of action sounds in intentional infliction of emotional distress. As stated above, conduct which is so reckless that it is certain or sub-

stantially certain to result in severe emotional distress would support the cause of action under the rule set forth in the Restatement of Torts.

Sandra Stege's claim for emotional distress should not be denied because her husband's claim may be within the purview of "Feres". Her claim is a personal one in that the wrong was committed upon her and also because it is a separate tort recognized in Illinois and a great many jurisdictions in the United States.

We are not dealing with a determination by state law which regards the right as a personal right (such as loss of consortium, etc.) but a separate and distinct tort which gives rise to a separate and distinct cause of action. The Federal Tort Claims Act and the court-made exception as enumerated in "Feres" and its progeny does not control dependents of servicemen on active duty as they are able to bring a cause of action against the military under circumstances when the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U. S. C., Section 1346(b); *Robak* v. *United States* (7th Cir.) 658 F. 2d 471.

Sandra Stege's cause of action is a viable one in which evidence should be taken to afford her an opportunity to prove each element of her case. Dependents of servicemen should not also be relegated to second-class citizenship.

CONCLUSION

Petitioner respectfully prays that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

GEORGE CONIGLIO
FRANK E. GLOWACKI
DONALD E. ARNELL
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued October 20, 1983)

October 21, 1983

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. EDWARD DUMBAULD, *Senior District Judge*•

SANDRA STEGE, Individually and as Administratrix of the Estate of ROBERT H. STEGE,

Plaintiff-Appellant,

No. 83-1150 *vs.*

UNITED STATES OF AMERICA and MUHAMMED A. ANSARI,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 C 445
CHARLES P. KOCORAS, *Judge.*

ORDER

On May 1, 1979, Sgt. Robert Stege, a naval officer on active duty, died as a result of injuries he sustained

• The Honorable Edward Dumbauld, Senior District Judge for the Western District of Pennsylvania, sitting by designation.

during elective surgery performed at the Naval Regional Medical Center, Great Lakes, Illinois. Shorty thereafter, Sandra Stege, the decedent's wife, filed this action on behalf of hereself and her husband's estate. She now appeals from the district court's grant of the defendant's motion to dismiss. On October 20, 1983, we affirmed from the bench.

Plaintiff raises three issues on appeal. First, she contends that the district court erred in holding that her husband could not recover under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680. The law is well settled, however, that military personnel on active duty may not recover from the government under this Act for claims arising out of the alleged malpractice of military medical personnel. *See Feres* v. *United States,* 430 U.S. 135 (1950); *LaBash* v. *United States Department of the Army,* 668 F.2d 1153 (10th Cir.), *cert. denied,* 456 U.S. 1008 (1982); *Collins* v. *United States,* 642 F.2d 217 (7th Cir.), *cert. denied,* 452 U.S. 964 (1981); *Henninger* v. *United States,* 473 F.2d 814 (9th Cir.), *cert. denied,* 414 U.S. 819 (1973); *Hall* v. *United States,* 451 F.2d 353 (1st Cir. 1971) (per curiam); *Lowe* v. *United States,* 440 F.2d 452 (5th Cir.) (per curiam), *cert. denied,* 404 U.S. 833 (1971). The Supreme Court has, in fact, recently reaffirmed the *Feres* doctrine. *See Chappell* v. *Wallace,* 103 S. Ct. 2362 (1983). Though the result may be harsh, we must apply the law. Plaintiff's argument that *Feres* should be overturned is addressed to the wrong court.

Second, Stege alleges that even if plaintiff's decedent cannot recover under the FTCA, she has stated a cause of action under the Medical and Dental Care Act, 10 U.SC. §§ 1071-1087. That Act provides for medical and dental care for military personnel and their dependents; it does not create a cause of action for medical malpractice.

Third, the plaintiff argues that she may bring an action under the FTCA for the negligent infliction of emotional distress she suffered as a result of the treatment her husband received. The basis of her argument is that *Feres* does not bar her claim because she is not a serviceman. Even assuming Stege could prove the elements of this tort, her alleged injury was incident to Sgt. Stege's service and is, therefore, barred by *Feres*. *Hinkie* v. *United States*, 715 F.2d 96, 98 (3d Cir. 1983); *DeFont* v. *United States*, 453 F.2d 1239, 1240 (1st Cir.) (per curiam), *cert. denied*, 404 U.S. 910 (1972).

For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SANDRA STEGE, Individually and as Administratrix of the Estate of ROBERT H. STEGE, Deceased,
Plaintiff,

v.

UNITED STATES OF AMERICA and MUHAMMED A. ANSARI,
Defendants.

No. 81 C 445

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

Plaintiff in this action seeks redress for the death of her husband, Sergeant Robert H. Stege, based on the alleged malpractice committed upon him by agents and employees of the United States. It is not disputed that the following occurred. Sergeant Stege was admitted to an Illinois naval medical facility for elective surgery in 1979. He sought treatment of primary infertility and had chosen to have a varicocelectomy performed. This operation was to consist of ligation of the left spermatic vein. Instead of that, however, a ligation of the external iliac vein of the left leg actually took place. The iliac is a portion of the major vein returning blood from the leg to the heart. Further surgery was performed the next day, but the Sergeant succumbed six weeks later to acute bronchopneumonia, complicated by idioventricular rhythm followed by cardiac arrest. Both the United States and Lieutenant Commander Ansari, the doctor who

performed the sergeant's first operation, are named as defendants in the action.

Despite the tragedy which the facts of this case readily evince, defendants' motion to dismiss must be granted because this Court does not have jurisdiction under the sole grounds set forth by plaintiff, the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671, *et. seq.* Counts II and III, alleging the intentional tort of battery, are expressly excluded from the limited waiver of sovereignty contained in the Federal Tort Claims Act. 28 U.S.C. §2680(h); *Moos* v. *United States*, 225 F.2d 705 (8th Cir. 1955), *followed in Hernandez* v. *United States*, 465 F. Supp. 1071 (D. Kan. 1979).

The remainder of the complaint is barred by the holding in *Feres* v. *United States*, 340 U.S. 135 (1950) and its progeny. These cases make clear that a serviceman on active duty is without judicial remedy if he sustains an injury "incident to" his military service due to governmental negligence. *Feres, supra.* Under the law of this Circuit and the others which have addressed this and analogous issues, Sgt. Stege's death resulting from "elective surgery must be considered "incident to" his service since his injuries occurred while he was on active duty, was subject to military discipline, and was taking advantage of medical privileges granted only to medical personnel. *Harten* v. *Coons*, 502 F.2d 1363 (10th Cir. 1974) (elective surgery case); *Lowe* v. *U.S.*, 440 F.2d 452 (5th Cir. 1971) (*per curiam*) (elective surgery case). *See also, U.S.* v. *Brown*, 348 U.S. 110 (1954); *LaBash* v. *United States Dept. of the Army*, 668 F.2d 1153 (9th Cir. 1982); *Collins* v. *U.S.*, 642 F.2d 217 (7th Cir. 1981); *Herreman* v. *U.S.*, 476 F.2d 234 (7th Cir. 1973) (death from plane crash was "incident to service" when serviceman was non-paying passenger on military aircraft, returning from purely social trip, and was taking advantage of services available only to the military). Damages for plaintiff's own mental anguish are also barred by *Feres.*

DeFont v. *U.S.*, 453 F.2d 1239 (1st Cir. 1972), *cert. denied*, 407 U.S. 910, (1972).

Thus, despite plaintiff's policy arguments, and the tragic circumstances of the case, this Court has no choice but to follow the unmistakably clear body of legal precedent which neither Congress nor the Supreme Court has yet seen fit to overrule. Defendants' motion to dismiss is granted in its entirety.

So ordered.

/s/ CHARLES P. KOCORAS
United States District Judge

Dated: 11/29/82

APPENDIX C

Federal Tort Claims Act

28 U. S. C., Section 1346 (b):

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act of omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C., Section 2674.

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

28 U. S. C., Section 2680:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, Section 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

June 25, 1948, c. 646, 62 Stat. 984; July 16, 1949, c. 340, 63 Stat. 444; Sept. 26, 1950, c. 1049, Sections 2(a) (2), 13(5), 64 Stat. 1038, 1043; Aug. 18, 1959, Pub.L. 86-168, Title II, Section 202(b), 73 Stat. 389.

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